Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:3:TL-N-2584-01
RLPeacock

date:

to: Richard Antoinette, Team Manager, Manhattan Appeals
Attention: Freddy W. Tang, Appeals Officer

from: Area Counsel (Financial Services & Healthcare)(Area 1: Manhattan)

subject: [redacted] ([redacted], [redacted] and [redacted])

STATUTES OF LIMITATION EXPIRE: [redacted]

UIL Nos. 6501.08-00 and 6501.08-17

INTRODUCTION

This memorandum responds to your request for assistance via telephone on [redacted]. This memorandum should not be cited as precedent. Specifically, you have asked our office to provide you with the appropriate language to use on a Form 872 (Consent to Extend the Time to Assess Tax)("Form 872") with respect to [redacted] ("[redacted]") for the taxable years ending [redacted], [redacted], and [redacted].

ISSUES

1. Which entity is the proper entity to execute a Form 872 for [redacted] for the taxable years ending [redacted], [redacted], and [redacted]?

2. What specific language should be used on the Form 872 for [redacted] for the taxable years ending [redacted], [redacted], and [redacted]?

BACKGROUND

This opinion is based upon the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon.

[redacted] (EIN [redacted]) is a Delaware corporation. For the taxable years ending [redacted], [redacted], and [redacted], [redacted] filed a Form 1120 U.S. Corporation Income

Tax Return ("Form 1120") with its subsidiaries. The LMSB Manhattan Appeals Division currently has jurisdiction over [redacted]'s income tax liability for the taxable years [redacted], [redacted], and [redacted].

In [redacted], [redacted] merged with [redacted] (a.k.a. "[redacted]")("merger one"). Our office does not have a copy of the merger agreement from merger one. Instead, we have reviewed the following items which describe merger one, and the events leading up to the completion of merger one: 1) one page from [redacted]'s Form 10-K, which was filed with the Securities and Exchange Commission; 2) a proxy statement filed by [redacted] in [redacted]; 3) pages 200D and 200E of the Form 886-A prepared by the revenue agent; and 4) two pages from the engineer's report concerning the sale of [redacted] stock.

According to [redacted]'s Form 10-K, [redacted]'s proxy statement, the revenue agent's Form 886-A, and the engineer's report, the history underlying merger one is as follows. On [redacted], in an attempt to prevent [redacted] from taking over [redacted], [redacted] exchanged [redacted] shares of [redacted] series B preferred stock (convertible into [redacted]% ownership interest in [redacted] for [redacted] shares of [redacted] ("[redacted]") series A cumulative convertible preferred stock (convertible into [redacted]% of [redacted] common stock then outstanding).

On [redacted], the Boards of Directors of [redacted] and [redacted] approved an agreement to merge their two companies. The proposed merger between [redacted] and [redacted] violated [redacted]'s [redacted] Share Exchange Agreement with [redacted] ("[redacted]"), the parent of [redacted]. [redacted] sued [redacted] and [redacted] to delay their merger until [redacted] met [redacted]'s demands, and [redacted] sued [redacted] to protect its merger with [redacted]. The lawsuits were ultimately settled. One condition of the settlement, however, was that [redacted] was required to spin off its [redacted]% stake in [redacted] communications to the shareholders of [redacted].

On [redacted], [redacted] purchased [redacted] shares of common stock of [redacted] in a tender offer. This step was the first step of the merger between [redacted] and [redacted].

On [redacted], [redacted]'s [redacted] preferred stock was converted into [redacted] shares of [redacted] class A common stock.

[redacted], [redacted], and [redacted] entered into an Agreement and Plan of Merger, dated [redacted], as amended and restated as of [redacted], as further amended and restated as of [redacted], and as further amended and restated as of [redacted] ("merger agreement one"). Merger agreement one provided that [redacted], which was a wholly-owned subsidiary of [redacted]

[redacted], merged with and into [redacted], with [redacted] surviving the merger. This step was the second step of the merger between [redacted] and [redacted]. In the merger, each outstanding share of [redacted] common stock was exchanged for a fraction of a share of each of [redacted] Series C and D preferred stock. In addition, [redacted]'s shares of [redacted] were distributed to [redacted][1]/. [redacted] became a wholly-owned subsidiary of [redacted]. Merger one was completed on [redacted].

On [redacted], [redacted] executed a Form 872 captioned "[redacted] (FKA [redacted]) [redacted] (EIN [redacted]) as successor in interest by way of merger with [redacted] (EIN [redacted])" for the taxable years [redacted], [redacted] and [redacted]. While there may be additional Forms 872 which were executed after the effective date of merger one, our office does not have copies of these Forms 872. The Form 872 was signed by [redacted], the Vice President of Taxes for [redacted]. The Appeals Team Chief signed the Form 872 on [redacted]. The current statute of limitations for [redacted]'s [redacted], [redacted] and [redacted] taxable years expires on [redacted].

In [redacted] or [redacted], [redacted] and [redacted] ("[redacted]") created a holding company known as [redacted] ("[redacted]"). [redacted] and [redacted] were each [redacted]% shareholders of [redacted]. [redacted] was the parent company of two wholly-owned subsidiaries: [redacted] ("[redacted] Merger Sub"), a Delaware Corporation, and [redacted] Merger Sub, Inc. ("[redacted] Merger Sub"), a Delaware Corporation. On [redacted], [redacted], [redacted], [redacted], [redacted] Merger Sub and [redacted] Merger Sub entered into an Agreement and Plan of Merger ("merger agreement two").

The merger agreement provided as follows:

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[1]/ The background materials provided by the revenue agent indicate that [redacted] owned [redacted]% of [redacted], and that [redacted] was required to distribute this stock to the shareholders of [redacted] during the merger pursuant to a settlement agreement between [redacted], [redacted], [redacted] and [redacted]. The proxy statement, however, seems to suggest that, as of the effective date of the merger, [redacted] distributed shares of [redacted] to [redacted] in exchange for [redacted] stock. Because we have not been provided with any evidence that [redacted] owned any [redacted] stock prior to the effective date of the merger, we presume that it was [redacted] who distributed shares of [redacted] to [redacted], and not vice versa.

2.1 The Mergers. Upon the terms and subject to the conditions set forth in this Agreement, and in accordance with the Delaware General Corporation Law ...

(a) [redacted] Merger Sub shall be merged with and into [redacted] (the "[redacted] Merger"). [redacted] shall be the surviving corporation in the [redacted] Merger and shall continue its corporate existence under the laws of the State of Delaware. As a result of the [redacted] Merger, [redacted] shall become a wholly owned subsidiary of [redacted].

(b) [redacted] Merger Sub shall be merged with and into [redacted] (the "[redacted] Merger"). [redacted] shall be the surviving corporation in the [redacted] Merger and shall continue its corporate existence under the laws of the State of Delaware. As a result of the [redacted] Merger, [redacted] shall become a wholly owned subsidiary of [redacted].

The merger agreement also provided that, as a result of the merger, holders of shares of [redacted] common stock would each receive 1 share of [redacted] stock. The holders of shares of [redacted] common stock, Series [redacted] stock and Series [redacted] common stock would each receive [redacted] shares of [redacted] common stock, [redacted] common stock and [redacted] common stock, respectively. The holders of shares of [redacted] Series [redacted] convertible preferred stock, Series [redacted] convertible preferred stock, Series [redacted] convertible preferred stock and Series [redacted] preferred stock received one share of [redacted] Series [redacted] convertible preferred stock, Series [redacted] convertible preferred stock, Series [redacted] convertible preferred stock and Series [redacted] preferred stock, respectively.

As a result of the [redacted] merger ("merger two"), [redacted] and [redacted] became the wholly-owned subsidiaries of [redacted]. [redacted]'s shareholders owned approximately [redacted]% of [redacted]; [redacted]'s shareholders owned approximately [redacted]% of [redacted]. In addition, [redacted] Merger Sub and [redacted] Merger Sub, which were created solely for the purpose of acquiring [redacted] and [redacted], respectively, were merged out of existence. The merger was completed on [redacted].

[redacted] has remained in existence after merger two.

At issue is the proper entity who may sign a Form 872 after the effective date of merger two, for [redacted]'s [redacted], [redacted] and [redacted] pre-merger consolidated income tax liabilities. Also at issue is the proper language to use on the Form 872.

DISCUSSION

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 8.1.1, chapter 3, provides procedures for processing consents to extend the statute of limitations on Assessment.

1. Which entity is the proper entity to execute a Form 872 on behalf of [redacted] for the taxable years [redacted], [redacted] and [redacted]?

The first issue is which entity is the proper entity to execute a Form 872 for [redacted] after merger two for the pre-merger tax years.

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. This exception provides that the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. The Service uses the Form 872 to memorialize such consent for corporations.

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment for income tax can be found in the consolidated return regulations. See Treas. Reg. § 1.1502-1 et seq. Pursuant to the consolidated return regulations, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given shall be considered as having been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Unless there is an agreement to the contrary, an agreement entered into by the common parent extending the time within which an assessment of tax may be made for the consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. § 1.1502-77(c)(1).

The common parent remains the agent for the members of the group for any year during which it was the common parent, whether consolidated returns are filed in subsequent years, whether one

or more subsidiaries have become or have ceased to be members of the group, whether the common parent ceases to be the common parent or a member of the group in any subsequent year, and whether the group continues pursuant to Treas. Reg. § 1.1502-75(d). See Treas. Reg. § 1.1502-77(a). See also, Prop. Reg. § 1.1502-77(a)(4) (September 26, 2000). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for income tax for any taxable year for which it was the common parent, as long as it remains in existence.

Here, [redacted] has remained in existence after both mergers one and two. Under the current regulations and the proposed regulations, it is, therefore, the appropriate party to execute the Form 872 on its own behalf for [redacted], [redacted] and [redacted].

Note, however, that there may be an alternative agent authorized under Treas. Reg. §1.1502-77T who can execute the Forms 872 on behalf of [redacted][2]/. Treas. Reg. § 1.1502-77T provides alternative agents for the purpose of extending the statute when the common parent of a group ceases to be a common parent, whether or not the common parent remains in existence. Under this provision, a waiver obtained from any one of several alternative agents is deemed to be given by the agent of the group. See Treas. Reg. §1.1502-77T(a)(3). Treas. Reg. § 1.1502-77T(a)(4) sets forth the following alternative agents:

> (i) The common parent of the group for all or any part of the year to which the notice or waiver applies;
>
> (ii) A successor to the former common parent in a transaction to which section 381(a) applies;
>
> (iii) The agent designated by the group under Treas. Reg. §1.1502-77(d);
>
> (iv) If the group remains in existence after a reverse acquisition or downstream transfer, the common parent of the group at the time the waiver is given or the notice mailed.

[redacted] was the common parent for the group during the years at issue. As such, it may be treated as an alternative agent under Treas. Reg. § 1.1502-77T(a)(4)(i) with respect to new Forms 872 that it executes after it ceases to be the common parent of the

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[2]/ The Service published proposed regulations on September 26, 2000 which terminate the application of Treas. Reg. § 1.1502-77T. See Prop. Reg. § 1.1502-77(a). The proposed regulations are not yet effective. See Prop. Reg. § 1.1502-77(h).

group. After merger one, [redacted] became an alternative agent for [redacted] for [redacted], [redacted] and [redacted]. After merger two, [redacted], as the "successor to the successor," became an alternative agent for [redacted] for [redacted], [redacted] and [redacted], pursuant to Treas. Reg. § 1.1502-77T(4)(ii). Subparagraph (a)(4)(iii) does not apply because no agent appears to have been designated by the group. Subparagraph (a)(4)(iv) does not apply because it does not appear that there was a reverse acquisition or downstream transfer in either merger one or merger two.

Treas. Reg. § 1.1502-77T(4)(ii) provides that a successor to the former common parent in a transaction to which section 381(a) applies is an alternative agent. Section 381 applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraphs A, C, D, F or G of section 368(a)(1). If the subject merger is a tax-free reorganization within the meaning of sections 361 and 368(a)(1), then section 381 will apply to the merger.

To qualify as a tax-free reorganization under section 368(a)(1), the following requirements must be met: First, the transaction must be structured as a Type A, C, D, F, or G reorganization. I.R.C. § 368(a)(1). Second, there must be continuity of proprietary interest. Treas. Reg. § 1.368-1(b). Third, the restructuring must have been pursuant to a plan of reorganization. I.R.C. §§ 354 and 361. Fourth, there must be a business purpose for the reorganization. Treas. Reg. §1.368-1(c). Finally, there must be continuity of business enterprise. Treas. Reg. § 1.368-1(d). In the subject case, it appears that the above requirements have been met by both mergers.

First, merger one appears to be a Type A reorganization because it is the merger of [redacted] into [redacted], with [redacted] emerging as the surviving corporation, pursuant to the corporation laws of the state of Delaware. See Treas. Reg. § 1.368-2(b)(1). [redacted] retained a sufficient proprietary interest in [redacted] because it exchanged its stock for the stock of [redacted] and for [redacted]'s interest in [redacted] (pursuant to the terms of the settlement of the lawsuit between [redacted], [redacted], and [redacted]). See Treas. Reg. § 1.368-1(e)(1). The restructuring was pursuant to a plan of reorganization as evidenced by merger agreement one. The business purpose of the reorganization is evident because there appears to be no purpose for the merger, other than a business purpose. Finally, there is continuity of business enterprise since there has been no indication that [redacted] would discontinue [redacted]'s previous business activities. See 12 U.S.C. § 214b.

Second, merger two is a Type A reorganization because it is the merger of [redacted] Sub into [redacted], with [redacted] emerging as the surviving corporation, and the merger of [redacted] Sub into [redacted], with [redacted] emerging as the surviving corporation, resulting in [redacted]'s ownership of both [redacted] and [redacted], pursuant to the corporation laws of the State of Delaware. See Treas. Reg. § 1.368-2(b)(1). [redacted] retained a sufficient proprietary interest in [redacted] because it exchanged its stock for the stock of [redacted]. See Treas. Reg. § 1.368-1(e)(1). The restructuring was pursuant to a plan of reorganization as evidenced by merger agreement two. The business purpose of the reorganization is evident because there appears to be no purpose for the merger, other than a business purpose. Finally, there is continuity of business enterprise since there has been no indication that [redacted] would discontinue [redacted]'s previous business activities. See 12 U.S.C. § 214b.

In view of the foregoing, merger one and merger two both appear to be reorganizations within the meaning of section 368(a)(1)(A). Therefore, [redacted] (after merger one) and [redacted] (after merger two) would be the successors to [redacted] in a transaction to which section 381 applies. [redacted] (after merger one) and [redacted] (after merger two) would then be alternative agents for purposes of entering into an agreement to extend the statute of limitations on assessment for the [redacted] consolidated group for the tax years at issue, pursuant to Treas. Reg. §1.1502-77T(a)(4)(ii).

Here, your office has previously obtained a signed Form 872 from [redacted] with respect to the income tax liability of [redacted] for the taxable years [redacted], [redacted] and [redacted]. [redacted] executed a Form 872 after merger one on behalf of [redacted] as the "successor in interest by way of merger," in accordance with Treas. Reg. §1.1502-77T. Although [redacted] and [redacted] would be appropriate alternative agents to sign the Forms 872 on behalf of [redacted], the proposed regulations eliminate the alternative agent rules in an effort to provide certainty as to who may execute Forms 872 on behalf of consolidated groups. We therefore recommend that, in the future, your office obtain Forms 872 executed by [redacted], consistent with the guidelines set forth in Treas. Reg. § 1.1502-77(a) and Prop. Reg. § 1.1502-77(a) (9/26/00). Although the proposed regulations are not yet in effect, they reflect the preferred thinking of the Service.

Note, also, that the regulations under section 6501(c)(4) do not specify who may sign consents to extend the statute of limitations. Accordingly, the rules applicable to the execution of an original return have been deemed to apply to the execution

of a consent to extend the time to make an assessment. See Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. In the case of a corporate return, section 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Here, an officer of [redacted] should sign any future Forms 872.

2. What specific language should be used on the Form 872?

The second issue is what language should be used on the Form 872 for [redacted].

The caption on the Form 872 extending the statute of limitations for [redacted]'s [redacted], [redacted] and [redacted] income tax liabilities should read, "[redacted]."

If [redacted] was a partner in any partnerships during the taxable years in issue, and if the statute of limitations on partnership item adjustments is still open, we recommend that a Form 872-I be used rather than a plain Form 872. The Form 872-I contains applicable TEFRA language.

Should you have any questions regarding this matter, please contact Robin L. Peacock at (212) 264-1595, extension 246.

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